

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

|                                    |   |                            |
|------------------------------------|---|----------------------------|
| WILLIE GUNNEL,                     | § |                            |
| Petitioner,                        | § |                            |
|                                    | § |                            |
| v.                                 | § | CIVIL ACTION NO: H-06-2295 |
|                                    | § |                            |
| NATHANIEL QUARTERMAN,              | § |                            |
| Director of the Texas Department   | § |                            |
| of Criminal Justice - Correctional | § |                            |
| Institutions Division,             | § |                            |
| Respondent.                        | § |                            |

**MEMORANDUM AND RECOMMENDATION**

Petitioner Willie Gunnel's application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 4). Respondent has filed a motion for summary judgment (Dkt. 10), to which petitioner has responded (Dkt. 13). The court recommends that respondent's motion be granted and Gunnel's application be denied.

**BACKGROUND**

On February 5, 2004, a jury sitting in the 23rd District Court of Brazoria County, Texas found Gunnel guilty of aggravated robbery and, finding at least two enhancements for punishment to be true, sentenced him to sixty years imprisonment. Gunnel appealed. The Fourteenth Court of Appeals affirmed Gunnel's conviction on March 1, 2005. The Texas Court of Criminal Appeals on June 22, 2005 dismissed his petition for discretionary review as untimely. Gunnel filed a state application for writ of habeas corpus on February 9, 2006. The Court of Criminal Appeals denied Gunnel's state application on April 12, 2006. Gunnel filed this federal petition for writ of habeas corpus on July 6, 2006.

The government does not contend that Gunnel’s current petition is barred by the one-year statute of limitations applicable to this case pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, or that Gunnel has failed to exhaust his state remedies.

### ANALYSIS

Gunnel is not entitled to federal habeas relief on his claims that were adjudicated on the merits<sup>1</sup> in state court unless the state court adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision may be “contrary to” federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite of the Supreme Court on a question of law, or if the state court “confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent” and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision involves an “unreasonable application” of federal law if the state court “identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

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<sup>1</sup> A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

Gunnel asserts that his conviction is based on evidence obtained through an unconstitutional search and seizure and arrest. He also asserts that the evidence does not support his conviction for aggravated robbery because there was no evidence at trial that he used a gun.

Federal courts may only review Fourth Amendment claims in habeas proceedings if the petitioner was denied a full and fair hearing in state court. *Stone v. Powell*, 428 U.S. 465, 494 (1976); *Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006) (to avoid the bar of *Stone*, petitioner must present argument that Texas courts systematically and erroneously apply the state procedural bar to prevent adjudication of Fourth Amendment claims). Gunnel argues only that the state court was erroneous in denying his Fourth Amendment claims. He does not argue that he was prevented from litigating them, and in fact, he did litigate those claims at trial, on appeal, and in his state habeas proceeding. Gunnel's points of error based on alleged violations of the Fourth Amendment do not present grounds for federal habeas relief.<sup>2</sup>

In reviewing an insufficiency of evidence claim, a federal court on habeas review must consider whether, "after viewing the evidence in the light most favorable to the prosecution, any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000). The federal court may not make credibility findings, and conflicting inferences must be resolved in favor of the verdict. *Ramirez v. Dretke*, 398 F.3d

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<sup>2</sup> To the extent Gunnel's claims are based on alleged violation of state law, he does not state a claim for federal habeas relief. *Cook v. Morrill*, 783 F.2d 593, 596 (5th Cir. 1986) (federal habeas courts "do not sit as a 'super' state supreme court in a habeas corpus proceeding to review errors under state law").

691, 695 (5th Cir. 2005). Although Texas state courts recognize a “factual insufficiency” of the evidence claim, only a “legal insufficiency” of the evidence claim may be raised in federal court. *Pemberton v. Collins*, 991 F.2d 1218, 1224 (5th Cir. 1993).

Here, the state court of appeals fully considered the evidence under the more stringent “factual insufficiency” Texas standard of review and found that the evidence supported the conviction. The store cashier, Rafiquali Momin, who was the only eyewitness, gave a statement to officers shortly after the robbery that one of the robbers showed him a gun. Another witness testified that Momin told him shortly after the robbery that he was robbed with a gun. Another witness who spoke with Momin following the robbery testified that Momin was not certain the weapon shown to him was a gun, but it was enough to make him cooperate with the robbers. At trial, Momin testified that he was not sure that the weapon he was shown was a gun, but he believed it was a gun, it looked like a gun, and he was very scared. Momin also testified that he was scared to testify at trial. There was also testimony from an associate of Gunnel’s that Gunnel was carrying a .22 caliber handgun in the days following the robbery.<sup>3</sup>

Based on this record, the court cannot say that no rational fact finder could have concluded that a gun was used in the robbery, and thus the state court’s rejection of Gunnel’s insufficiency of evidence claim was not objectively unreasonable. Gunnel is not entitled to federal habeas relief.<sup>4</sup>

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<sup>3</sup> *Gunnel v. State*, No. 14-04-00214-CR, slip op. at 14-16.

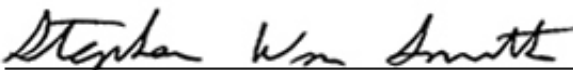
<sup>4</sup> Gunnel’s response to respondent’s motion includes a request for evidentiary hearing. This court will not conduct an evidentiary hearing unless a petitioner shows that his factual

## CONCLUSION

For the reasons stated above, the court recommends that Gunnel's petition be denied with prejudice.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on May 15, 2007.

  
Stephen Wm Smith  
United States Magistrate Judge

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allegations, if true, would entitle him to relief. *See* 28 U.S.C. § 2254(e)(2); *Murphy v. Johnson*, 205 F.3d 809, 815-16 (5th Cir. 2000); *Schriro v. Landrigan*, No. 05-1575, 2007 WL 1387823, \*6 (S. Ct. May 14, 2007). Gunnel is not entitled to an evidentiary hearing in this case.